In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1379

CHARLES DAVID MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-7) is reported at 524 F. 2d 72.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1975, and a petition for rehearing with suggestion for rehearing *en banc* was denied on February 19, 1976 (Pet. App. 1-2). The petition for a writ of certiorari was filed on March 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner may challenge, as an unconstitutional delegation of legislative power, the unexercised authority granted the Attorney General to modify the classification of cocaine as a controlled substance.

2. Whether petitioner's acquittal of a conspiracy charge precluded his conviction upon a substantive narcotics offense in a unitary trial.

3. Whether there was sufficient evidence to support petitioner's conviction for possession of cocaine with intent to distribute.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and was sentenced to thirteen years' imprisonment, to be followed by three years' special parole.[1] The court of appeals affirmed (Pet. App. 3-7).

The evidence showed that petitioner offered to pay John Graham one hundred dollars a day in return for permission to sell cocaine from Graham's house. Graham refused, although he did allow petitioner and co-defendants Busard and Levine to stay in his home temporarily. Petitioner instructed Busard to transport scales and a supply of what petitioner represented to Graham was cocaine from their car to Graham's house (App. 128-131).[2] Petitioner placed that substance in Graham's refrigerator (App. 131). Graham subsequently informed agents of the Drug Enforcement Administration of this activity (App. 128, 157-158).

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[1]Prior to submitting the case to the jury, the court entered a judgment of acquittal on behalf of petitioner and co-defendant Busard on a conspiracy count. Busard also was convicted of possessing cocaine with intent to distribute it. Co-defendant Stuart Levine pleaded guilty to possession of a controlled substance before trial.

[2]"App." refers to the Appendix in the court of appeals.

Acting upon this information, the D.E.A. agents obained a search warrant for Graham's house (App. 159). Upon its execution, they discovered approximately 94 rams of cocaine wrapped in plastic and aluminum foil tored in a plastic container in Graham's refrigerator App. 143-145, 164).

ARGUMENT

1. Petitioner contends (Pet. 6) that his conviction must be overturned because 21 U.S.C. 811(a), under which the classification of cocaine as a controlled substance may be modified or deleted, is unconstitutional. He argues that the statute, which empowers the Attorney General, upon proper recommendation of the Secretary of Health, Education, and Welfare, to modify the schedules of controlled substances originally established by Congress, is an unconstitutional delegation of legislative power.

The court of appeals rejected an identical argument in *United States* v. *Westlake*, 480 F. 2d 1225, 1226 (C.A. 5), stating:

> Congress initially classified cocaine as a Schedule II Controlled Substance, and the Attorney General has neither rescheduled nor deleted cocaine from the list of controlled substances since the effective date of the statute. Appellant therefore has not been affected by whatever delegation of authority may be embodied in the statute.

Petitioner suggests (Pet. 6-7) that *Westlake* is distinguishable because certain other drugs have now been rescheduled. However, the status of cocaine, the substance petitioner was convicted of possessing, has not

been modified by the Attorney General; it remains a Schedule II controlled substance (see Pet. App. 16). Thus, this case presents no occasion to review the question petitioner raises.

2. Petitioner contends (Pet. 7) that the district court's entry of a judgment of acquittal on the conspiracy count precluded his conviction on the substantive narcotics count in this unitary trial.

In general, a conspiracy and the substantive offense which is its object are separate offenses, requiring proof of different facts. See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770; *Sealfon* v. *United States*, 332 U.S. 575. The essence of the crime of conspiracy is an agreement to commit an unlawful act. Acquittal on the conspiracy charge does not necessarily resolve in defendant's favor any fact necessary to convict for the underlying offense, but simply may show that the prosecution failed to prove the existence of an agreement among the alleged conspirators.

Thus, petitioner is in error in arguing (Pet. 7-8) that, by acquitting him on the conspiracy count, the district court necessarily found him innocent of the substantive offense. See *Blanton* v. *United States*, 531 F. 2d 442 (C.A. 10), certiorari denied, April 19, 1976, No. 75-1072. In fact, the district court's action clearly indicates that it found no inconsistency, since it allowed the substantive count to go to the jury. So long as the evidence was in fact sufficient to support the conviction on the substantive count, petitioner has no grievance.

3. Petitioner contends (Pet. 8) that his conviction should be reversed because there was insufficient evidence linking him to the cocaine seized by the federal narcotics agents. However, the government introduced sufficient circumstantial evidence to establish beyond a reasonable

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doubt that petitioner possessed that cocaine with intent to distribute it. *Glasser* v. *United States*, 315 U.S. 60, 80. A witness testified that shortly before departing for Graham's house, petitioner removed a container, which he said held cocaine, from his own refrigerator and stated that he intended to sell it (App. 54). Graham testified that petitioner placed a quantity of white powder stored inside a plastic container in his refrigerator and represented that it was cocaine. Upon its seizure, chemical analysis of the substance found in such a container inside Graham's refrigerator showed that it was cocaine. Thus, the court below properly found that there was a sufficient basis upon which the jury could have found beyond a reasonable doubt that the cocaine was connected to petitioner (Pet. App. 7). See *United States* v. *Montalvo*, 271 F. 2d 922 (C.A. 2).[3]

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[3]Petitioner further contends (Pet. 9-10) that the cocaine should not have been admitted into evidence because it was not then wrapped in the same manner as it had been when seized by federal narcotics agents. However, this argument merely challenges the jury's assessment of the credibility of Graham's testimony that he observed a white powder through the lid of the container when petitioner initially placed it in his refrigerator. The jury was fully informed that the cocaine was wrapped in plastic and aluminum foil at the time it was discovered by federal agents. This factual question concerning the reliability of Graham's testimony was decided adversely to petitioner by the jury and does not warrant further review.

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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